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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

BEN F. HOPKINS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF MATTERS INVOLVED.

This case arose on the petition of a taxpayer, the petitioner herein, to the Circuit Court of Appeals for the Sixth Circuit, to review a decision of the Tax Court of the United States. The decision of the Circuit Court of Appeals, of which review is herein sought, affirmed a decision of the Tax Court of the United States. This was the second review by the Circuit Court of Appeals of the action of the Tax Court in this case. The first decision of the Circuit Court of Appeals is reported at 144 F. (2d) 683 and was designated as Docket No. 9,566 of the Circuit Court of Appeals. The opinion appears in the Record at page 137. The decision of the Tax Court and the second review of the Circuit Court of Appeals involved facts adduced in part at the first hearing before the Tax Court and in part at

the second hearing before the Tax Court. To avoid reprinting the entire record on the second review the Circuit Court of Appeals entered an order which, in effect, directed that the record on the first review was to be considered as a part of the record on the second review. (Record, p. 153.) The second review in the Circuit Court of Appeals was designated as Docket No. 10,183. Both records accordingly are included in the record accompanying this petition.

On the first review the Circuit Court of Appeals reversed a determination of the Tax Court which had sustained deficiencies in income tax asserted against the petitioner by the respondent for the years 1936 to 1939 inclusive in the aggregate amount of $84,972.79. (Record, p. 133.) The Circuit Court of Appeals, however, on the first review directed the Tax Court to reconsider and determine the tax liability of the petitioner under the provisions of Section 22(a) of the Revenue Acts of 1936 and 1938. (See Appendix.) The Tax Court, after taking additional evidence, thereupon sustained deficiencies for those years in the same amount under the provisions of Section 22(a). (Record, p. 95.) The last mentioned decision of the Tax Court gave rise to the second review in the Circuit Court of Appeals and review of that decision is herein sought.

The decision of the Circuit Court of Appeals was to the effect that the income of two trusts established by the petitioner, each for the benefit of a minor son, should be included in the petitioner's individual income under the provisions of said Section 22(a).

Each trust instrument, the trusts being identical, provided a life estate for a son of the petitioner, with a gift over to others at the death of the son on default of the exercise of a testamentary power of appointment given to the son. During the minority of the son, the income was to be accumulated and added to principal and thereafter was to be paid to the son currently. Each agreement con-

tained a proviso that, during the life of the grantor, there should be paid to the son such amounts of the income or principal as the grantor might direct for the best interests of the son. (Record, pp. 98-99.) The petitioner and a large bank were designated as and acted as trustees of the trusts. (Record, p. 97.) All administrative powers required the unanimous action of both trustees. There was no prospect of reversion or other benefit to the petitioner. The trusts contained provisions customarily included in trusts created in the community of the petitioner's residence. (Record, p. 119.)

The trusts were established by the petitioner when the sons were respectively 15 and 16 years of age. The purpose of the trusts was to assure the sons the necessities of life as long as they lived, regardless of other financial situations. (Record, p. 103.)

On a prior review of an earlier decision of the Tax Court involving the application of Section 167, the Circuit Court of Appeals had given careful and lengthy consideration to the interpretation of the agreements and held that the income of each trust was distributable, without any discretion to withhold, after the son attained the age of 21 years. (Record, p. 143.) Upon remand of the case for the consideration of the petitioner's tax liability under the provisions of Section 22(a), the Tax Court, without discussing the question, adopted in its second decision an exactly contrary construction and held that the income was to be withheld or distributed in the discretion of the grantor during the lifetime of the grantor. (Record, p. 108.) The Tax Court based its decision on the continuation of this alleged power during the lifetime of the grantor. On the second review in the Circuit Court of Appeals (the decision presently involved), the Circuit Court of Appeals, on the day following the argument, affirmed the decision of the Tax Court without opinion "* * * upon the grounds and for the reasons stated in the opinion of the Tax Court of the United States * * *." (Record, p. 155.)

JURISDICTIONAL STATEMENT.

The Supreme Court has jurisdiction to review the judgment here in question under Section 240(a) of the Judicial Code, as amended by the Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. § 347(a), providing that in any case in a Circuit Court of Appeals, it shall be competent for the Supreme Court, upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it.

QUESTIONS PRESENTED.

The questions here presented are:

1. Whether the retention by the grantor of an irrevocable trust of the power to distribute to or withhold income from the life beneficiary of the trust as the grantor shall deem for the "best interests" of the beneficiary constitutes such control over the income of the trust as to require taxation of such income to the grantor under Section 22(a) of the Internal Revenue Code, pursuant to *Helvering v. Clifford,* 309 U. S. 331 (1940).

2. Whether by affirming without opinion an interpretation of the trust instrument by the Tax Court which was the basis of the Tax Court's decision and which was squarely in conflict with the prior decision of the Circuit Court of Appeals on the same point, the Circuit Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR THE ALLOWANCE OF WRIT.

1. The decision of the Circuit Court of Appeals is in conflict with the decisions in

a. *Hawkins v. Commissioner,* 152 F. (2d) 221 (C. C. A. 5, 1945), which held that the retention by the grantor of control over the income of a trust does not subject him to tax on that income; and

b. *Hall v. Commissioner,* 150 F. (2d) 304 (C. C. A. 10, 1945), which held that a power to require accumulation of income of a trust, which has the incidental effect of transferring accumulated income from the current beneficiary to the remainderman, is not such control over income as will justify taxing it to the grantor.

2. The Circuit Court of Appeals has decided a federal question, the application of Section 22(a) of the Revenue Acts of 1936 and 1938, in a way probably in conflict with applicable decisions of this Court:

a. In *Helvering v. Clifford,* 309 U. S. 331 (1940), which decision indicated that the income of a trust is to be included in that of the grantor under said Section 22(a) only where the combination of factors involved, such as the reversion to the grantor after a short term, the absolute discretionary power of the grantor over distribution of income, and the complete administrative power of the grantor as sole trustee, was such that the grantor continued in effect to be the owner of the property.

b. In *Helvering v. Stuart,* 317 U. S. 154 (1942), which decision indicated that economic gain realized or realizable by the grantor of a trust is necessary to require the income of a trust to be included in that of the grantor, that non-material satisfactions of a donor in creating a trust are not to be taken into account in determining taxability, that a power to distribute or accumulate income for the economic advantage of the beneficiary, circumscribed by fiduciary

responsibilities, is not a control over a trust so complete that the taxpayer is the owner of the income.

3. The Circuit Court of Appeals has decided an important question of federal law which has not, but which should be settled by this Court, namely, whether the retention by the grantor of an irrevocable trust of the power to distribute to or withhold income from the life beneficiary of the trust as the grantor shall deem for the "best interests" of the beneficiary constitutes such control over the income of the trust as to require taxation of such income to the grantor under Section 22(a) of the Internal Revenue Code, pursuant to *Helvering v. Clifford*, 309 U. S. 331 (1940), there having been no other decision of any Court holding such a power over income sufficient to require taxation of the income to the grantor in the absence of very broad administrative control reserved to the grantor.

4. The Circuit Court of Appeals, by affirming without opinion an interpretation of the trust instrument by the Tax Court, which was the basis of the Tax Court's decision and which interpretation was squarely in conflict with the prior decision of the Circuit Court of Appeals in the same case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10,183, *Ben F. Hopkins, Petitioner, v. Commissioner of Internal Revenue, Respondent*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment

herein of said Circuit Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated April 25, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

BEN F. HOPKINS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The Circuit Court of Appeals rendered its decision in this case on October 18, 1946, its decision being reported in 157 F. (2d) 679. (Record, p. 155.) Rehearing was denied February 6, 1947. (Record, p. 167.) The findings of fact and opinion of the Tax Court in this case were entered September 27, 1945, being reported in 5 T. C. 803. (Record, p. 95.) The memorandum opinion of the Tax Court on the first hearing appears at page 15 of the record, and the opinion of the Circuit Court of Appeals on the first review is reported at 144 F. (2d) 683. (Record, p. 137.)

JURISDICTION.

1. The date of the judgment to be reviewed is October 18, 1946. Petition for rehearing was filed November 6, 1946, and denied February 6, 1947, and this petition will be presented within ninety days thereafter.

The statutory provision sustaining jurisdiction is Section 240(a) of the Judicial Code, as amended by the Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. § 347 (a), which permits this Court to require, by certiorari, cer-

tification of cases in the Circuit Courts of Appeals for determination by this Court.

STATEMENT OF THE CASE.

The history and facts of the case are stated in the Petition for Writ of Certiorari, in support of which this brief is submitted. The facts will therefore not be repeated here.

ERRORS RELIED UPON.

The United States Circuit Court of Appeals, by its adoption of the judgment and reasoning of the Tax Court, erred:

1. In holding that the retention by the grantor of an irrevocable trust of the power to distribute to or withhold income from the life beneficiary of the trust as the grantor shall deem for the "best interests" of the beneficiary constitutes such control over the income of the trust as to require taxation of such income to the grantor under Section 22(a) of the Internal Revenue Code, pursuant to *Helvering v. Clifford*, 309 U. S. 331 (1940).

2. In basing the decision upon the co-existence of alleged control over income and "other broad powers" when in fact, the petitioner and a large bank were trustees of the trusts and administrative powers could be exercised only by the joint action of the petitioner and the bank; and in basing its decision upon the existence of such "other broad powers" without ever having determined or found as a fact that any such powers existed.

3. In holding, if it did so hold, that each trust instrument, as a matter of law, permitted the grantor in his discretion, during his life, to direct the accumulation of the income after the beneficiary became of age.

4. In holding that the income of the trusts was required to be included in that of the grantor under the

authority of *Helvering v. Clifford*, 309 U. S. 331 (1940), and *Helvering v. Stuart*, 317 U. S. 154 (1942), and under the provisions of Section 22(a) of the Internal Revenue Code.

SUMMARY OF ARGUMENT.

1. The decision of the Circuit Court of Appeals is in conflict with *Hawkins v. Commissioner*, 152 F. (2d) 221 (C. C. A. 5, 1945), in that that decision held that the retention by the grantor of a trust of complete power to change the beneficial interests, short of requiring disposition to himself, did not justify taxing the grantor on the income, at least in the absence of other elements, indicating that he remained in substance, the owner; while the decision below held that retention of a much more limited power over income required taxation of the grantor, notwithstanding the absence of such other elements.

The decision below is also in conflict with *Hall v. Commissioner*, 150 F. (2d) 304 (C. C. A. 10, 1945), in that that case held that a power to require accumulation of income, which would have the incidental effect of transferring the amount so accumulated to the ultimate remainderman, did not amount to control over the beneficial interests so as to permit taxing the grantor even where the grantor, the sole trustee, had complete administrative control of the trust property; while the decision below held that such a power amounted to a power "to sprinkle the income about among the beneficiaries" and thus made the grantor subject to tax as the substantial owner.

2. The decision below is in conflict with *Helvering v. Clifford*, 309 U. S. 331 (1940), in that that case indicates that the grantor is to be taxed on the income of a trust only where he has retained so many of the rights of ownership that he may be said to have remained in substance the owner; while the decision below holds that taxation of the grantor was required where he retained none of the elements emphasized in the *Clifford* case, liability being predi-

cated instead on the very limited control of the grantor over distributions of income.

The decision is also in conflict with *Helvering v. Stuart*, 317 U. S. 154 (1942), in that that case held that economic gain realized or realizable by the taxpayer is an essential element, while the decision below relied on the existence of a limited power which could not be exercised for the economic gain of the taxpayer.

3. The question of law involved is one which has not been, but should be, settled by this Court. The decision in *Helvering v. Clifford, supra*, has given rise to voluminous litigation in the lower courts. The lower courts have been unable to determine the limits of its application, and have in their opinions recognized the need for clarification by this Court. The decision below should be selected for such review because it represents the most extreme extension of the so-called *Clifford* doctrine so far announced, and because it presents a clear cut issue as to the application of the *Clifford* rule to provisions which are not susceptible of use for tax evasion.

4. The Circuit Court of Appeals, by affirming without opinion an interpretation of the trust instrument by the Tax Court, which was the basis of the Tax Court's decision and which interpretation was squarely in conflict with the prior decision of the Circuit Court of Appeals in the same case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

5. Review of the decision by the Circuit Court of Appeals is not prevented by the rule of *Dobson v. Commissioner*, 320 U. S. 489 (1943), because the question involved is purely a question of law, and because the courts below have considered that their decision involved the application of principles of law enunciated by this Court and other courts.

ARGUMENT.

1. The decision of the Circuit Court of Appeals is in conflict with Hawkins v. Commissioner, 152 F. (2d) 221 (C. C. A. 5, 1945) and Hall v. Commissioner, 150 F. (2d) 304 (C. C. A. 10, 1945).

The conflict between the decision in the present case and those cited above involves the application of another Circuit Court of Appeals decision, that of *Commissioner v. Buck*, 120 F. (2d) 775 (C. C. A. 2d, 1941) and a brief explanation of the *Buck* case will facilitate understanding of the problem.

The *Buck* case applied the decision of this Court in *Helvering v. Clifford*, 309 U. S. 331 (1940), to a situation where the grantor of an irrevocable trust had reserved a power, among others, to change the provisions for distribution to the beneficiaries in any manner. While the court in the *Buck* case emphasized the grantor's power to determine the beneficial enjoyment of the income, the decision actually rested on a combination of powers so extensive that the grantor was considered to have remained in effect the owner of the property. The basis of the Court's decision is indicated in the following statement by Judge Frank which is often quoted:

> "During his life, he has entire control of the sale and investment of the corpus, in whole or in part, and the voting power of any stock now or later constituting that corpus. *When to such control there is coupled the power, until his death, freely to sprinkle the income about among any beneficiaries he may select (as if he were playing a hose)*, it is impossible to conclude, in the light of the recent decisions of the Supreme Court, that the income is not taxable to him." (Emphasis supplied.)

The *Buck* case may be said to stand for the proposition (1) that a reversion after a short term need not be present if the grantor's control is otherwise so broad as to make

him substantially the owner, and (2) that the power to allocate income *among the beneficiaries* is an important element to be taken into account, *in combination with other powers,* in determining whether such control existed.

The *Hawkins* case, the *Hall* case, and the present case all involve situations in which it was contended that the grantor, by virtue of a power which he had with respect to income, retained such control as to remain the owner of the trust. The *Hawkins* case held that to tax the grantor because of a power to allocate income among the beneficiaries, at least in the absence of the other extreme powers noted in the *Buck* case, would be contrary to the decision of the Supreme Court in *Helvering v. Stuart, supra.*

In the *Hawkins* case the grantor did have the power to choose among current beneficiaries. He had reserved the right to "* * * alter or modify the provisions of distributions as herein set forth to the beneficiaries." The only limitation on his power over distributions was that he could not revest any of the principal or income in himself. It thus appears that the power to allocate income in the *Hawkins* case was substantially similar to that in the *Buck* case. The Circuit Court of Appeals nevertheless held that the income was not taxable to the grantor, reversing the Tax Court. The majority opinion stated that the Court need not concern itself with the correctness of the *Buck* and other decisions cited by the Tax Court where control of income was involved because such cases presented other elements of control and benefits reserved by the settlor or actually exercised by him. A later decision in the same circuit, *McCutchin v. Commissioner,* 159 F. (2d) 472 (C. C. A. 5, 1947), has clarified the *Hawkins* case by indicating that where there are present other circumstances, such as the fact that the trustee was controlled by the grantor and that the trusts appeared to be manipulated for the benefit of the grantor, the income may be taxed to the

grantor as the owner of the property. The court indicated, however, that it considered the *Hawkins* case still to be good law.

It thus now appears that the law in the Fifth Circuit is that even the extremely broad power to control the distribution of income in any manner and to any person except the grantor himself is not alone sufficient to permit taxation of the grantor on income, but that such a power must be combined with such other powers as were found in the *Buck* case.

In the present case the Tax Court, and the Circuit Court of Appeals by adopting the opinion of the Tax Court, held that the petitioner had the power to "spray" the income among the beneficiaries of the trust, and that he therefore was taxable on the income. The Tax Court said in its opinion:

> "It is obvious, we think, that the petitioner under section 15 had the right to 'spray' the net income of the trusts as between primary beneficiaries and the remaindermen within the thought of *Commissioner v. Buck*, 120 F. (2d) 775, and more particularly within the decision in *Stockstrom v. Commissioner*, 148 F. (2d) 491, affirming 3 T. C. 255." (Record p. 104.)
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> "• • • he had the power to direct the benefits of the trusts either to the limited beneficiaries under the wills of his sons, or, upon their intestacy, to their issue or their widows, or in default thereof to a certain foundation in Cleveland, Ohio." (Record, p. 108.)

The power which the petitioner had over the income was not a broad power to "spray" the income, as in the *Hawkins* and *Buck* cases. It was not a power to choose to any extent among current beneficiaries. The Tax Court said that the petitioner here could select between the current beneficiary and the remainderman. This, however, gave him no real choice, since the issue of the minor sons

were not then known to the grantor and in addition the grantor's son had a power of appointment over the remainder. Thus the ultimate disposition of any income which had been accumulated would be within the control not of the grantor but of the beneficiary. To hold under such circumstances that the grantor had the power "freely to sprinkle the income about" is preposterous. The Tax Court's assertion to this effect, approved by the Circuit Court of Appeals, clearly shows the conflict between this case and the *Hawkins* case, where a contrary result was reached on facts more favorable to the government.

Nor are there other elements presented in the present case which can be said to distinguish it from the *Hawkins* case or which can be said to bring the present case within the principle of the *Buck* decision. In the *Hawkins* case the trustee was a bank. In the present case a bank and the petitioner were co-trustees, but administrative powers could be exercised only with the participation of the bank as co-trustee and the Tax Court found that the corporate trustee and not the grantor in fact exercised the administrative powers. (Record p. 103.) The situations in the *Hawkins* case and in the present case are thus essentially the same in this respect. It is true that the Tax Court's decision referred in passing to "other broad powers" (Record p. 104), but it will be noted that the Court did not hold either in its opinion or in its findings that there *were* any such powers. The only evidence in the case on this question is the testimony to the effect that the administrative powers were those usual and customary in the community.

The decision below may be said to stand for the proposition that a power to withhold income from a current beneficiary is sufficient to require taxation of the income to the grantor even in the absence of broad management powers reserved to the grantor alone. Such a distortion of the rule of the *Buck* case is squarely in conflict with *Hawkins v. Commissioner.*

Hall v. Commissioner, supra, 150 F. (2d) 304 (C. C. A. 10, 1945), involved a power with relation to income which is somewhat closer to that involved in the case at bar. The question there was whether a power to require the accumulation of income, which would have the incidental effect of transferring it from the present income beneficiaries to the remainderman in the event of the death of the beneficiary before distribution to him, was such a power over the income as to justify the conclusion that the grantor was the owner thereof. In the *Hall* case, as in the present case, there was no power to select among present or living beneficiaries. The grantor, who was also the sole trustee, had reserved the power to distribute the income to the beneficiaries, his four daughters, "in equal shares at any time in the discretion of the trustee," and in addition to expend from principal amounts reasonably necessary for specified purposes. The trust provided for gifts over to issue of deceased beneficiaries, and on default of issue, for a reverter to the grantor. After fifteen years the remaining corpus was to be distributed to the then beneficiaries. No income had ever been distributed.

The Tenth Circuit Court reversed the holding of the Tax Court, which had been to the effect that the grantor was taxable because he had a right to "sprinkle the income about among any beneficiaries he may select," within the rule of the *Buck* case. The decision of the Circuit Court was reached in spite of the fact that the grantor had a possibility of reverter, and, as *sole* trustee, had "unlimited powers of investment, contract, compromise, sale, lease and otherwise." It thus appears that in the Tenth Circuit a power with relation to income which consists only of a power to withhold distributions and thus augment the interest of the ultimate remaindermen is not such a control of income as will permit application of the *Buck* rule, even though numerous other factors found significant in the *Buck* and *Clifford* cases are present.

The Tax Court in the present case undertook to distinguish the *Hall* case on the ground that in the *Hall* case the trust was to last for a period of 15 years whereas (as the Tax Court erroneously assumed) the petitioner had that power "during the lifetime of the beneficiary." The Tax Court gives the following quotation from the Circuit Court's decision in the *Hall* case to justify this distinction:

> "* * * In our case the trustee was authorized in his discretion to withhold the distribution of income, but he could not shift it from one beneficiary to another—nor could he hold it during his lifetime or the lifetime of the beneficiaries as in the *Stockstrom* and *Miller* cases, and cited therein. The trustee could not change the beneficial interest of the beneficiary; he was not authorized or empowered to 'reduce or obliterate' the share of principal or interest originally allocated to any of the beneficiaries. At the expiration of the trust, fifteen years from the date of its execution, the corpus and economic income must be distributed to the beneficiaries or their issue. * * *."

Contrary to the assumption of the Tax Court the language from the opinion in the *Hall* case does not indicate that the power to withhold income which might go to another beneficiary upon the death of the primary beneficiary is a "spray" or "sprinkle" provision. The Court in the *Hall* case must have known that upon the death of any one of the five beneficiaries of the trust within the period of 15 years, a circumstance not unlikely to happen, accumulated income would go to another person. Yet the Court said "The trustee could not change the beneficial interest of the beneficiary." The *Hall* case is in fact authority for the proposition that any such withholding is not a shift "from one beneficiary to another" within the meaning of the *Buck* rule, and is not a power "to change the beneficial interest of the beneficiary." There is no essential difference between a power to withhold income from the beneficiary of a 15 year trust and a power to withhold from the

beneficiary of a longer trust, especially when the beneficiary of the longer trust has a power of appointment over the accumulated income. In both situations any power of selection is limited and the possibility of a real selection is even more tenuous in the latter case. The essential difference between the two cases lies in the fact that in the *Hall* case it was held that such a power is not a power to change the beneficial interest of a beneficiary while in the present decision the exactly contrary conclusion was reached.

2. The Circuit Court of Appeals has decided a federal question, the application of Section 22(a) of the Revenue Acts of 1936 and 1938, in a way probably in conflict with applicable decisions of this Court, particularly Helvering v. Clifford, 309 U. S. 331 (1940), and Helvering v. Stuart, 317 U. S. 154 (1942).

In *Helvering v. Clifford, supra,* this Court departed from the previous concept that the taxation of the income of a trust was controlled exclusively by the sections of the internal revenue law which dealt specifically with that subject, and decided that, under the facts there presented, the income of a trust was taxable to the grantor under the provisions of Section 22(a) of the applicable Revenue Act (see Appendix) (now Section 22(a) of the Internal Revenue Code). This is the so-called "gross income" section which defines gross income in general terms.

The trust in the *Clifford* case was to last for five years, with a possibility of earlier termination, and the corpus was to revert to the settlor at the end of the term. The settlor was the sole trustee and had practically unlimited investment and administrative powers; he also had absolute discretion to determine how much, if any, of the income was to be paid over to his wife, who was the income beneficiary.

On those facts, the Supreme Court had no difficulty in deciding that:

> "• • • the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a)."

This Court said, moreover,

> "that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and are appropriate foundations for findings on that issue. • • • The bundle of rights which he retained was so substantial that respondent cannot be heard to complain that he is the 'victim of despotic power when for the purpose of taxation he is treated as owner altogether'."

The differences between the *Clifford* case and the case here presented are so pronounced as to require little comment. The present trust is not a short term trust nor is there any temporary re-allocation of income within an intimate family group. Nor is there any such broad control over the administration of the trust as was retained by the grantor in the *Clifford* case.

It is the petitioner's position that the attempted extension of the *Clifford* doctrine in the present proceeding goes so far as to conflict with that decision. The *Clifford* case indicates that there are limits to its application. The circumstances of the trust or the powers reserved must be such, under the *Clifford* rule, as to justify the conclusion that the grantor continued to be the owner. The absence of all of the elements stressed in the *Clifford* case indicates that the present trusts do not meet the tests of that case.

Decisions of the Circuit Court of Appeals, unreviewed by this Court, have indicated that control over income, when combined with broad management powers, may meet the test of the *Clifford* doctrine. These decisions hold, in effect, that control alone may be sufficient to invoke the doctrine of the *Clifford* case, regardless of the term of the

trust. It is not necessary, however, for this Court to overrule such decisions to find a conflict between the decision below and this Court's decision in the *Clifford* case. Whether or not these cases have carried the *Clifford* rule too far without the supervision of this Court, they fall far short of requiring taxability of the income to the grantor in the case at bar. Indeed, the limits indicated in such decisions as the *Buck* and similar cases show that a contrary result should have been reached in the instant proceeding under the facts and circumstances here presented.

The petitioner also submits that the decision below is in conflict with the decision of this Court in *Helvering v. Stuart, supra*, 317 U. S. 154 (1942). In that case this Court remanded a decision of the Seventh Circuit for redetermination of the taxpayer's liability under the provisions of Section 22(a), and took occasion to make some observations with respect to the application of the *Clifford* rule. This Court limited the rule of the *Clifford* case by emphasizing that the "non-material satisfactions" of a donor are not taxable as income. Referring to the power of the trustees (the petitioner, his wife and his brother) to distribute or withhold income until the children-beneficiaries attained the age of 25 years, the Court said:

> "Plainly, these distributions or accumulations were to be used for the economic advantage of the children of the settlors and to the amount of these distributions and accumulations would satisfy the normal desire of a parent to make gifts to his children. Is this alone sufficient to make the income of the trusts taxable to the settlors?
>
> "Disregarding for the moment the minority of some of the beneficiaries, we think not. So broad a basis would tax to a father the income of a simple trust with a disinterested trustee for the benefit of his adult child. No act of Congress manifests such an intention. *Economic gain realized or realizable by the taxpayer*

is necessary to produce a taxable income under our statutory scheme." [1] (Emphasis supplied.)

The Court went on to say that economic gain as distinguished from non-material satisfactions could be obtained "* * * through control of a trust so complete that it must be said that the taxpayer is the owner of its income."

In the present case the right to withhold income for the best interests of the children is plainly a right that may be exercised for the "economic advantage of the children," not of the grantor; nor are there any findings or any facts which tend to indicate the existence of control of the trust that is "so complete that it must be said that the taxpayer is the owner of its income." It thus appears that the very power upon which the Tax Court predicated its decision is a power which this Court has said is not sufficient to make the income taxable to the grantor of a trust. The present case is thus squarely in conflict with *Helvering v. Stuart.*

3. The Circuit Court of Appeals has decided an important question of federal law which has not, but which should be settled by this Court.

The question here presented is whether the retention by the grantor of an irrevocable trust of the power to distribute to or withhold income from the life beneficiary of the trust as the grantor shall deem for the "best interests"

---

[1] This petitioner has already been held (by the decision of the Court of Appeals on the first review) to be taxable on that part of the income which he might have used to satisfy his obligation to support his sons, and the present case concerns only the balance of the income. The question whether the satisfaction of that obligation could constitute "economic gain" to the taxpayer is thus not involved in this proceeding, since the amount so taxable to him could not exceed the amount for which he is already taxable under the first decision. *Cushman v. Commissioner,* 153 F. (2d) 510, 514 (C. C. A. 2, 1946), holding that "* * * if taxation is to be predicated on that benefit, it should also be limited by that benefit."

of the beneficiary constitutes such control over the income of the trust as to require taxation of such income to the grantor under Section 22(a) of the Internal Revenue Code, pursuant to *Helvering v. Clifford*, 309 U. S. 331 (1940).

In the preceding section the petitioner has contended that the decision below is in conflict with the decisions of this Court in the *Clifford* and *Stuart* cases. The petitioner's position in this respect is that those decisions have indicated some boundary to the scope of the so-called *Clifford* rule and that the present case is beyond that boundary. If, however, it is considered that the *Clifford* case, as interpreted in the *Stuart* case, has not provided boundaries that are sufficiently definite to determine taxability in a case like the one here presented, then it is submitted that an important federal question is presented which has not been but which should be settled by this Court.

The implications of the *Clifford* rule have, in fact, been a source of difficulty to the lower courts. The *Clifford* decision has been cited by lower courts in over 200 decisions. In 1945 it was reported that the application of the *Clifford* principle had actually been litigated in 165 cases, of which the Government had won 76 and the taxpayers 77. *Eisenstein, Some Iconoclastic Reflections on Tax Administration* (1945), 58 Harv. L. Rev. 477, 492. Such litigation will continue, and in fact must continue, until this Court has announced how far it will go. It cannot be denied that there must be some limit to the elasticity of *Helvering v. Clifford*. Now or later, this Court is sure to find it necessary to declare the boundaries of its rule. The government has consistently refrained from applying for certiorari in cases of this type, possibly indicating its fear of an examination of the extensions of the *Clifford* rule which have been made by the lower courts. It is submitted that for this Court to delay longer in taking action will result in increasing immeasurably the burden, not only on the government and the litigant, but also on those con-

cerned with the preparation and administration of trusts, which results from the present uncertainty. The case here involved is submitted as one clearly presenting the issues most needing to be clarified, since it will permit this Court to determine the extent to which control over income, unaccompanied by other factors found to exist in the *Clifford* case, may justify taxability.

It is recognized that it may be desirable that the lower courts should develop, over a period of time, the details of a broad and general rule such as that in the *Clifford* case, before a too specific definition is handed down by this Court. The present state of the law in the Circuit Courts suggests, however, that action by this Court is already overdue. In *Stockstrom v. Commissioner*, 148 F. (2d) 491 (C. C. A. 8, 1945), one of the more than 40 opinions in which the *Buck* case has been cited, the Court of Appeals said:

> "It is to be wished, of course, that the field opened up by the *Clifford* case may come to have some definite monuments, but the doctrinal state in which the matter has been left by the Supreme Court permits, for the present, of only a case-by-case progression 'to determine precisely where the line shall be drawn between gifts of income-producing property and gifts of income from property of which the donor remains the owner, for all substantial and practical purposes.' *Harrison v. Schaffner*, 312 U. S. 579, 583, 584."

Judge Sanborn, concurring in the same decision, added:

> "I think it is unfortunate that courts which are required to determine such controversies as this must express opinions which are obviously little more than guesses. The number of cases in which the doctrine of *Helvering v. Clifford, supra,* is invoked indicates the difficulty which the Bench and Bar are having in applying that doctrine."

But Judge Learned Hand, who had concurred in the *Buck* case, said later in *Kohnstamm v. Pedrick*, 153 F. (2d) 506 (C. C. A. 2, 1945):

"The test is impalpable enough at best; but if it is to be continually refined by successive distinctions, each trifling in itself, we shall end in a morass from which there will be no escape; and the spate of decisions already poured upon us will be the earnest of eventual utter confusion."

The foregoing and other comments of the lower courts indicate the need for clarification of this subject.

4. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

On the first appeal to the Circuit Court of Appeals careful consideration was given to the interpretation of the trust instrument and the Court clearly concluded, as stated in its opinion at 144 F. (2d) 683, 688 (Record, p. 142):

> "The income of the trust was payable directly to the son as a matter of right and without restriction when he became of age."

The opinion of the Tax Court at the later hearing is equally clear, but precisely to the opposite effect. The opinion of the Tax Court is grounded solely on the contrary interpretation of the agreement as is indicated by the following language, in which the authorities cited by the petitioner are distinguished:

> "Plainly, therefore, since in the instant case the petitioner as grantor had the power *completely* to withhold the income and the trust endured *during the lifetime of the beneficiary*, the *Hall* case is of no assistance, but indicates rather that, under the circumstance involved in the situation here at hand, the answer would be different." (Emphasis supplied.) (Record, p. 108.)

On the second review by the Circuit Court, the normal procedure would have been for that Court to remand the case to the Tax Court with instructions to proceed in ac-

cordance with the opinion of the first review if, indeed, the Circuit Court did not enter judgment for the petitioner. Instead, however, the Circuit Court, a different panel of judges sitting,[2] merely affirmed the decision of the Tax Court without any opinion of its own. Nor is the situation clarified by the Circuit Court's denial of the motion for rehearing (Record, p. 167) when it is considered that the motion clearly pointed out the unusual situation, and stressed particularly the need for an opinion to clarify the effect of the Court's decision; but the motion for rehearing was likewise denied without an opinion.

A litigant has no constitutional or statutory right to an opinion from a reviewing court, but when a case is presented involving an important precedent, which had attracted dissents in the Court below, and where the lower Court had in effect overruled the reviewing Court and based its decision thereon, it is submitted that this Court should exercise its supervisory jurisdiction on the ground that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of such power.

5. Review of the decision of the Circuit Court of Appeals is not prevented by the rule of Dobson v. Commissioner, 320 U. S. 489 (1943).

The *Dobson* case held that a decision of the Tax Court should not be reversed except where a "clear-cut question of law" is presented, and that conclusions of ultimate fact for which there is "warrant in the record" should not be disturbed. It is understood that the *Dobson* rule is not one affecting the jurisdiction of this Court, nor does it determine the propriety of granting certiorari, especially where,

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[2] The panel of judges on the first appeal consisted of Circuit Judges Simons (presiding), Hamilton and McAllister, and the opinion was by Judge Hamilton. The panel of judges on the second appeal consisted of Circuit Judges Allen (presiding), Martin and Miller.

as here, the Court of Appeals has decided the case on the merits; that the rule, where applicable, is one which points toward affirmance of the Tax Court, rather than denial of certiorari. It is therefore assumed that extensive argument on this point should properly be postponed until the argument on the merits of the case, in the event that certiorari is granted.

If certiorari is granted the petitioner is prepared to demonstrate that the question here involved is a question of law in that it involves the determination of the proper standard to be applied in the application of Section 22(a), rather than the determination whether that standard has been satisfied. Moreover, it is to be noted that the questions raised here are being treated by the lower courts and by the Treasury as questions of law. The decisions of the Circuit Courts in the *Hawkins*, *Stockstrom*, *Hall*, and *Buck* cases, as well as in the present case, all treat the problem as one of law. Moreover, the Treasury has issued regulations defining the scope of the *Clifford* rule in an attempt to solve the same legal problems as are presented here.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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APPENDIX.

Revenue Act of 1936, 49 Stat. 1648-1756, and Revenue Act of 1938, 52 Stat. 447-584:

"SEC. 22. GROSS INCOME.

"(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

In so far as is relevant to this case, the provisions of the corresponding sections in all other revenue acts to which reference has been made in the petitioner's brief, as well as the provisions of the corresponding section in the Internal Revenue Code, are identical with the above.

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1296.

BEN F. HOPKINS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONER.

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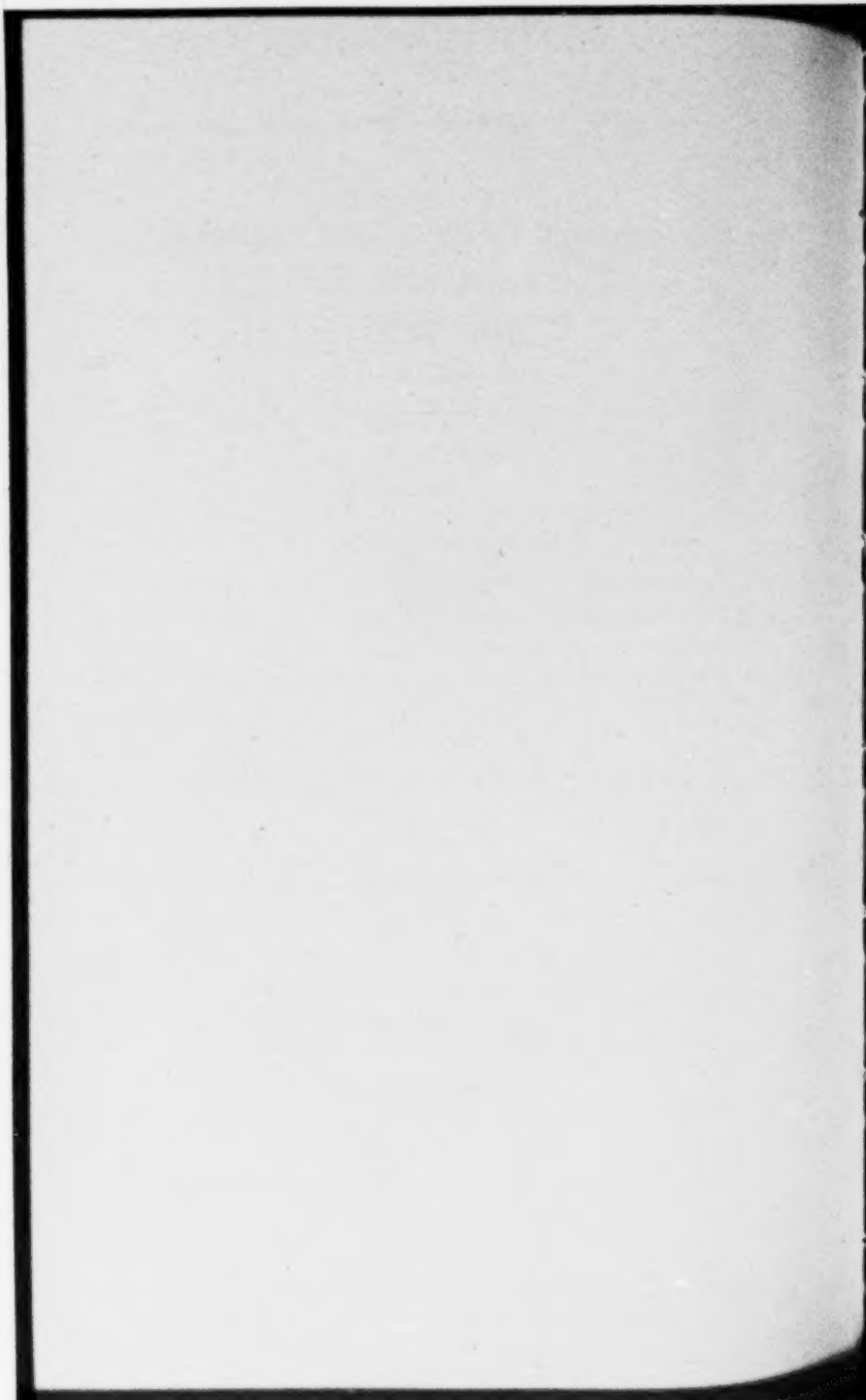

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1296.

BEN F. HOPKINS,
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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONER.

The respondent has filed a brief in opposition to the petition for certiorari, and this brief is submitted as a reply to the respondent's brief.

ARGUMENT.

In an effort to treat with severe brevity the questions presented in this proceeding, the respondent has, doubtless unwittingly, distorted the questions that are presented to this Court for consideration.

One of the principal questions presented for the consideration of this Court is whether the Circuit Court of Appeals has decided an important question of federal law which has not, but which should be, settled by this Court. This question appears to be ignored by the respondent. Instead his brief is primarily an extremely abbreviated discussion of the merits of the case, resting upon assertions as to the controlling effect of certain Circuit Court of Appeals decisions. If the Circuit Court cases do go as far as the respondent asserts, then they have gone so far beyond the wholesome concept of the doctrine of *Helvering vs. Clifford,* 309 U. S. 331 (1940), as to require examination of the extensions of that doctrine by this Court.

An extended explanation of the inapplicability of these cases would be out of place at this time. Indeed the respondent's argument of the merits of the case, however much condensed, is out of harmony with the rules of this Court as we understand them. It is appropriate to point out, however, if the desirability of granting certiorari is to depend upon whether *other* Circuit Court of Appeals decisions controlled the decision below, that the respondent has, nevertheless, misapplied the principles of such other decisions.

In the respondent's brief it is admitted (footnote No. 3, page 8) that the right of the petitioner's sons to receive the income under the trusts became fixed after the sons reached their majority; and that they were approaching their majorities when the trusts were created. There has never been a case in which the right to withhold income during the minority of a son has been taken into account in determining whether the income of a trust is taxable to the grantor. It is true that in *Stockstrom v. Commissioner*, 148 F. (2d) 491 (C. C. A. 8, 1945), and other cases cited by the respondent, a power to withhold income from distribution during the entire lifetime of the beneficiary (income which, when withheld, would pass to the remainderman chosen by the grantor) has been taken into account along with other broad powers of the grantor in determining taxability. The respondent asserts the applicability of such decisions under the claim that the grantor had such a power to divert the income to a remainderman "during the taxable years." Technical tax phraseology does not disguise the fact that this is merely a power to withhold during minority, a wise and proper provision which has never been taken into account in the cases in determining taxability. Indeed the respondent has proposed new regulations which specifically exclude such a power during minority as a test of taxability.

On pages 10 and 11 of his brief, the respondent, referring to the petitioner's powers as co-trustee, asserts that

"These broad management powers, especially when viewed in conjunction with taxpayer's absolute right to change the co-trustee and the provision exonerating either trustee of liability for any action it disapproved, constitute in the aggregate a bundle of rights sufficient to justify the Tax Court's treatment of taxpayer as the substantial owner of the trust property."

The following observations with respect to this statement are in order:

(a) In all reported cases the "broad management powers" taken into account in determining taxability have been powers reserved only to the grantor as trustee or otherwise. Here the grantor was trustee along with a large bank and nothing could be done by the petitioner without joint action by the bank. Common sense would indicate that for purposes of the application of the *Clifford* rule, the situation is practically the same as if the bank had been sole trustee, and no case has been found which places any emphasis whatsoever upon power held jointly with a bank trustee.

(b) While the petitioner could change the co-trustee, he was required to appoint another large bank or trust company and there is no basis for assuming that a newly appointed banking institution would be wholly subservient to the will of the grantor.

(c) The respondent failed to point out that the record shows that the trustee powers in the trust were usual and customary in this community.

(d) The cases cited do not sustain the above quoted proposition asserted by the respondent.

Aside from the reference to broad management powers which do not in fact exist, it may be noted that the respondent's brief, on the whole, emphasizes such powers and collateral circumstances of the trust as justification

for affirmance on the merits. In fact, many of the circumstances stressed by the respondent in his statement of the case were specifically excluded below as bearing upon the taxability of the income of the trust. It is to be noted, however, that the primary basis of the decision below was the alleged power of the grantor over income. We are concerned with the importance of the decision below as a precedent, and any effort to obscure the central issue of the case should be disregarded.

The respondent next asserts, on page 11, that affirmance was proper under the *Dobson* rule (*Dobson v. Commissioner*, 320 U. S. 489 (1943)), and it is claimed that "the judicial function is exhausted when there is found to be a rational basis" for the Tax Court's decision. This question is briefly discussed in the petitioner's main brief and its materiality at the present state of the proceeding is subject to question. We are concerned with the application of the principles of law set forth in the decisions of this Court in the *Clifford* and *Stuart* (*Helvering v. Stuart*, 317 U. S. 154 (1942)) cases. Indeed, the court below affirmed *not* under the *Dobson* rule but on the merits. It is also appropriate to mention that the case involves and in fact turned on the interpretation of a trust agreement. The Tax Court grounded its decision upon an erroneous interpretation that alleged powers over income continued during the lifetime of the petitioner. The respondent apparently admits that this construction is erroneous since in footnote No. 3 of his brief, page 8, it is stated that the sons' right to receive income became fixed after they reached their majority.

On pages 10, *et seq.* the respondent undertakes to refute the petitioner's contention that the decision below conflicted with *Hawkins v. Commissioner*, 152 F. (2d) 221 (C. C. A. 5, 1945), and *Hall v. Commissioner*, 150 F. (2d) 304 (C. C. A. 10, 1945).

There will probably never be any two cases involving the application of the *Clifford* rule where the facts are

exactly the same. This Court is concerned with the question whether the *basis* of the courts' decisions in the *Hawkins* and *Hall* cases is contrary to the legal principles applied in the court below. It was shown in the petitioner's main brief that such a conflict existed. The respondent's brief does not rebut this conclusion, but merely points out factual differences which are not pertinent here. For example, respondent directs attention to the fact that in the *Hawkins* case, a bank was the sole trustee, while in the present proceeding the petitioner and the bank were co-trustees. This is a difference which is not a distinction and which has nothing to do with the issue of whether a power with respect to income of the type here involved amounts to substantial ownership. The same is essentially true in the respondent's treatment of the *Hall* case. As was pointed out in the petitioner's brief, the *Hall* decision is authority for the proposition that a right to withhold income from one beneficiary which, upon the death of that beneficiary prior to distribution, would necessarily go to another person is not a "spray" or "sprinkle" provision within the meaning of the *Buck* rule. The respondent overlooks this basic principle of the *Hall* decision, and attempts to distinguish it on its facts by directing attention to the fact that the trust there was distributable after a period of years to the current beneficiary if he was then living, while the trusts here involved lasted for the lifetime of the beneficiary. The withheld income in both situations might go to other beneficiaries. The difference between the two situations is not significant, particularly when it is considered that the beneficiaries in the case at bar had a power of appointment to direct the distribution of the principal upon their death, and the power to withhold income from distribution continued only for a short time during the minority of the beneficiary. As stated, the principle of the *Hall* case is that such a power is not a "spray" or "sprinkle" provision within the meaning of the *Buck* rule. The approach in the *Hall* case to the problem thus presented ap-

pears to be more logical than the contrary approach of the court below. It is now in order for this Court to decide which of the two principles is to be adopted.

The respondent apparently makes no attempt to answer the following reasons given by the petitioner for the allowance of the writ:

(a) That the decision below was contrary to *Helvering v. Clifford, supra,* and *Helvering v. Stuart, supra.*

(b) That an important question of federal law was decided by the court below which has not but should be settled by this Court.

(c) That the decision below, by affirming without opinion the Tax Court's interpretation of the trust instrument which was the basis of the Tax Court's decision and which was squarely in conflict with a prior decision of the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1296

BEN F. HOPKINS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Tax Court (R. 95–109) is reported at 5 T. C. 803. The *per curiam* order of the court below (R. 155) is reported at 157 F. 2d 679.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1946. (R. 155.) Taxpayer's petition for rehearing was denied February 6, 1947. (R. 167.) The petition for a writ of certiorari was filed April 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer created a trust for each of his two minor sons under which he retained, in addition to other powers, the right to shift the income and corpus as between the sons and the remaindermen. Did the court below err in affirming the Tax Court's decision that taxpayer was taxable on the income of the trusts under Section 22 (a) of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code?

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Section 22 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and Section 22 (a) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 22) contain provisions identical with those of the Revenue Act of 1936 above quoted.

STATEMENT

The Commissioner determined deficiencies in taxpayer's income taxes for the year 1936 through 1939, on the ground that the income of two trusts created by taxpayer, one for each of his minor sons, was taxable to him under Sections 22 (a), 166, and 167 of the applicable Revenue Acts and Internal Revenue Code. (R. 8–13.) That determination has twice been reviewed by the courts below. In its first opinion the Tax Court sustained the Commissioner's determination under Section 167 and *Helvering* v. *Stuart,* 317 U. S. 154, and accordingly considered it unnecessary to pass on the applicability of Section 22 (a). (R. 15-21.) Upon appeal the Circuit Court of Appeals held (144 F. 2d 683) that taxpayer was taxable under Section 167 on only so much of the trust income as was equal to sums actually required and used for the support of the minor sons, but remanded the case to the Tax Court with directions to determine whether the entire trust income was taxable to taxpayer under Section 22 (a) and *Helvering* v. *Clifford,* 309 U. S. 331. (R. 137–150.) Upon the remand further evidence was taken (R. 95–96), the Tax Court made a restatement of the findings (R. 96–103), and sustained the Commissioner's determination under Section 22 (a) (R. 103–109). Taxpayer again appealed, the Circuit Court of Appeals affirmed without opinion (R. 155), and taxpayer's

petition for rehearing (R. 159–164) was denied (R. 167).[1]

The relevant facts, as contained in the stipulations and attached exhibits (R. 25–61, 79–94), and as found by the Tax Court (R. 96–103), may be summarized as follows:

On December 31, 1935, taxpayer created two identical trusts, one for each of his minor sons, naming himself and a bank as trustees. The corpus of each trust consisted of 5,000 shares of the common stock of a corporation of which taxpayer was the president and the largest single stockholder. (R. 96–97.) By paragraph 5 of the trust instruments taxpayer reserved the right at any time to remove the co-trustee bank and appoint another bank as successor. (R. 31, 97.) Under paragraph 7 the trustees were given broad management powers, including the power to invest and reinvest trust funds "irrespective of any statutes or rules or practices of Chancery Courts" limiting trust investments, to manage the trust property "as if the absolute owners", and to vote any securities in the trusts. (R. 33, 97–98.) Paragraph 8 empowered the trustees to make loans to taxpayer's executors or to purchase assets of his estate in order to facilitate payment of his

[1] By order of the court below the transcript of record on the first appeal was made part of the record on the second appeal. (R. 153–154.) The printed record incorporates the record on review on both appeals, except for cumulative matters.

estate and inheritance taxes. (R. 35, 100.) Paragraph 9 required the trustees to act unanimously but relieved them of liability, except for fraud or bad faith, "on account of any action taken in which one of the Trustees does not consent or approve". (R. 35–36.) Paragraph 14 empowered the trustees to pay out of corpus premiums on any insurance policies on taxpayer's life made part of the trusts. (R. 37–38, 98.) The trust instruments then provided as follows (R. 98–99):[2]

> 15. The net income from the trust estate shall be accumulated and added to the principal of the trust estate until my son Ben F. Hopkins, Jr. arrives at the age of twenty-one years and thereafter the net income shall be paid to him monthly so long as he lives, provided, however, that so long as I am living and competent to act, there may be and shall be paid to and applied and utilized for my son Ben F. Hopkins, Jr. from the net income and/or principal such sum or sums, and at such time or times, and in such manner as I may, in my sole discretion, deem to be to his best interests. Any income not paid to, nor expended nor utilized for my said son shall be accumulated and added to the principal of the trust estate.
>
> 16. Upon the death of my son Ben F. Hopkins, Jr. the trust estate remaining

[2] Except for the names of the sons the provisions of each trust were the same.

> unconsumed at his death shall vest in and be distributed in such shares and amounts, and in such manner, as my son Ben F. Hopkins, Jr. may appoint by last will and testament or codicil; provided, however, this power must be exercised in favor of one or more of the following, to-wit: My son's widow, the lawful issue of my son's body, my son's mother, and his brothers.

In case of the son's failure to exercise the power confered in paragraph 16, the remainder was to go to his issue or in default of issue to his brothers and their issue (subject to certain rights of the widow of the deceased son), and in default of any living beneficiaries to a certain Foundation. (R. 38, 98–99.) Paragraph 19 provided that the trust was irrevocable but reserved to taxpayer the right to enlarge the powers of the trustees. (R. 40, 99.)

The trust continued in force throughout the taxable years except for a modification in 1939 relating to the trustees' powers after taxpayer's death. (R. 100, 102–103.) In 1936, taxpayer added insurance policies on his life to the corpus of each trust, but during the taxable years furnished the trusts with funds to pay the premiums. (R. 102.)

Taxpayer's sons were minors throughout the taxable years. In each of the taxable years the trust income was accumulated and added to corpus, and no part of the trust estate was dis-

tributed. Taxpayer was amply able to provide for the support of his sons and did so out of separate funds. (R. 100–101.) The co-trustee bank kept possession of the trust property and the books of account. With rare exceptions taxpayer followed the bank's suggestions regarding administrative matters. As to investments, the practice of the bank was to make suggestions to taxpayer who either approved or made counter-proposals. (R. 103.)

ARGUMENT

The court below correctly affirmed the Tax Court's decision, sustaining the Commissioner's determination, that the income of the trusts was taxable to taxpayer under Section 22 (a) of the applicable Revenue Acts, *supra*. The Tax Court rested its decision primarily upon the powers retained by taxpayer to shift the trust income and corpus as between the sons and the remaindermen, and secondarily upon the other broad powers reserved by taxpayer.

1. Under paragraph 15 of each trust instrument, taxpayer reserved the right in his "sole discretion" to direct payments to his son at any times and in any amounts "from the net income and/or principal." (R. 98.) Upon the son's death "the trust estate remaining unconsumed" was to vest in a limited class of remaindermen to be appointed in the son's will, with remainders over in default of such appointment. (R. 98–99.)

Taxpayer thus had the right to apportion the corpus, as well as the income earned during the taxable years, as between the primary beneficiary and the remaindermen.[3] Only to the extent that he directed distribution to the sons would they receive any part of the trust funds; the "unconsumed" balance would go to the remaindermen. Indeed, under the plenary powers reserved to himself in paragraph 15 taxpayer could choose to terminate either trust at any time by directing distribution of the entire corpus to the son, and thereby cut off the interests of the remaindermen. The power to shift income among the natural objects of one's bounty represents perhaps the most important attribute of ownership. In harmony with the principles enunciated by this Court in *Helvering* v. *Clifford,* 309 U. S. 331, it has repeatedly been held that a settlor who retains such a power remains the substantial owner of the trust property for tax purposes.[4] Where, as

[3] The sons' right to receive the *income* became fixed under paragraph 15 only after they reached majority; during their minority, which embraced the taxable years (R. 100–101), taxpayer could elect either to distribute the income to them or add it to corpus. All of the income for the taxable years was in fact accumulated and added to corpus. (R. 101.) As for the *corpus*, taxpayer had the right at any time—before and after the sons attained majority—to direct distribution to the sons, or withhold it from them and thereby shift it to the remaindermen.

[4] See, e. g., *Stockstrom* v. *Commissioner*, 148 F. 2d 491 (C. C. A. 8th), certiorari denied, 326 U. S. 719; *Brown* v. *Commissioner*, 131 F. 2d 640 (C. C. A. 3d), certiorari denied,

here, he has retained the right to change the devolution of both the income-producing corpus and the income earned during the taxable years, the income is unquestionably includible in his gross income. This feature alone was sufficient to warrant the Tax Court's decision.

There is no merit in taxpayer's contention (Pet. 3, 6; Br. 12, 25–26) that the Tax Court's interpretation of paragraph 15 is contrary to that of the Circuit Court of Appeals in its original opinion, as is apparent from an examination of the pertinent portion of that opinion (R. 142–143). To so contend is to negate any effect to that court's remand of the case to the Tax Court for the purpose of determining the applicability of Section 22 (a), its subsequent affirmance of the Tax Court's decision, and its denial of taxpayer's petition for rehearing.

2. In reaching its decision the Tax Court also relied upon the "other broad powers" re-

318 U. S. 767; *Edison* v. *Commissioner*, 148 F. 2d 810 (C. C. A. 8), certiorari denied, 326 U. S. 721; *Commissioner* v. *Buck*, 120 F. 2d 775 (C. C. A. 2d); *Hyman* v. *Nunan*, 143 F. 2d 425 (C. C. A. 2d); *Miller* v. *Commissioner*, 147 F. 2d 189 (C. C. A. 6th); *Steckel* v. *Commissioner*, 154 F. 2d 4 (C. C. A. 6th); *George* v. *Commissioner*, 143 F. 2d 837 (C. C. A. 8th); *Helvering* v. *Elias*, 122 F. 2d 171 (C. C. A. 2d), certiorari denied, 314 U. S. 692. In the case of a family trust "the possession of such a power is conclusive" in marking the grantor the substantial owner of the trust property (*Hyman* v. *Nunan*, *supra*, p. 428), for it is "chief" among the "satisfactions which are of economic worth" (*Commissioner* v. *Buck*, *supra*, p. 777).

tained by taxpayer. (R. 104.) Taxpayer appointed himself and a bank as trustees, and reserved the right at any time to remove the bank and substitute another. (R. 97.) Although he and the bank were to act unanimously, they were not to be liable, except for fraud or bad faith, for "any action taken in which one of the Trustees does not consent or approve". (R. 35–36.) They were empowered, among other things, to vote any stock in the trusts,[5] to make investments without regard to statutory or judicial limiations upon trust investments,[6] to manage the trust estate as if they were the absolute owners, to make loans to or purchase assets from taxpayer's executors in order to facilitate payment of his estate taxes, and to pay out of corpus premiums on policies insuring taxpayer's life. (R. 97–98, 100.)[7] Taxpayer further reserved to himself the right to enlarge the powers of the trustees. (R. 99.) These broad manage-

[5] Taxpayer was the president, a director, and the largest single stockholder of the corporation whose stock comprised the original corpora of the trusts. (R. 96–97.) About two-thirds of the shares were sold in 1936, however, and no further sales or purchases were made during the taxable years. (R. 100.)

[6] With respect to investments it was the practice of the bank to make suggestions by letter to taxpayer, who either approved or made counterproposals. (R. 103.)

[7] In 1936 taxpayer added insurance policies on his life to the corpus of each trust, but during the taxable years he furnished the trusts with funds to pay the premiums. (R. 102.)

ment powers, especially when viewed in conjunction with taxpayer's absolute right to change the co-trustee and the provision exonerating either trustee of liability for any action it dissapproved, constitute in the aggregate a bundle of rights sufficient to justify the Tax Court's treatment of taxpayer as the substantial owner of the trust property. *Helvering* v. *Clifford, supra; Byerly* v. *Commissioner,* 154 F. 2d 879 (C. C. A. 6th), certiorari denied October 14, 1946; *Stockstrom* v. *Commissioner,* 148 F. 2d 491 (C. C. A. 8th), certiorari denied, 326 U. S. 719; *Miller* v. *Commissioner,* 147 F. 2d 189 (C. C. A. 6th). Certainly when the controls retained by taxpayer over distribution of the corpus and income are added to those retained over administration of the trust, the evidentiary support for the Tax Court's conclusion is unassailable. Under familiar rules governing the scope of judicial review of Tax Court decisions, reiterated by this Court in the *Clifford* case itself, affirmance of the Tax Court's decision by the court below was clearly proper. In *Dobson* v. *Commissioner,* 320 U. S. 489, 501, this Court cited the *Clifford* case as illustrative of the type in which "the judicial function is exhausted when there is found to be a rational basis" for the Tax Court's decision.

3. The decision below presents no conflict with *Hawkins* v. *Commissioner,* 152 F. 2d 221 (C. C. A. 5th), and *Hall* v. *Commissioner,* 150 F. 2d

304 (C. C. A. 10th), as taxpayer alleges (Pet. 5, Br. 13–19). Each case in this field turns, as it must, on its own facts. In the *Hawkins* case the court noted (pp. 221, 223) that the trustee was under "no control by the settlor", and that the settlor had "no voice in management" and reserved "no power save to alter distributions to named beneficiaries whom he is under no obligation to support or educate." These factors serve to distinguish that case from this one. Taxpayer here not only had a voice in management as one of the two trustees, but could change his co-trustee at will; moreover, the primary beneficiaries of the trusts here under scrutiny were taxpayer's minor sons whom he was obligated to support and educate. The same court which decided the *Hawkins* case refused to consider it controlling in *McCutchin* v. *Commissioner,* 159 F. 2d 472 (C. C. A. 5th), which bears a closer resemblance to the instant case.

In the *Hall* case the settlor retained no power to shift either income or corpus among the beneficiaries, but merely a power to postpone distribution of income to the income beneficiaries. The court reaffirmed (p. 307) the proposition that "the power to shift the income from one beneficiary to another is the realization of economic gain within the statute", and proceeded to point out that the taxpayer there reserved the right "to withhold the distribution of income, but he could not shift

it from one beneficiary to another". Taxpayer here had more than a power to postpone or accelerate the enjoyment of fixed beneficial interests; he reserved a lifetime power to determine how much of corpus and accumulated income should go to his sons rather to the remaindermen. *Stockstrom* v. *Commissioner, supra; Commissioner* v. *Buck,* 120 F. 2d 775 (C. C. A. 2d); cf. *Commissioner* v. *Estate of Holmes,* 326 U. S. 480.

Helvering v. *Clifford, supra,* and *Helvering* v. *Stuart,* 317 U. S. 154, with which taxpayer asserts the decision below is "probably in conflict" (Pet. 5, Br. 19), confirm rather than impugn the correctness of the decision below.

CONCLUSION

The decision below is correct. This case turns upon its particular facts and presents no question calling for further review. There is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

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